No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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I N D E X

James ADAMS, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

No. 82-5595.

United States Court of Appeals,
Eleventh Circuit.

July 18, 1983.

Petitioner, who was convicted of first-degree murder in a Florida state court and sentenced to death, appealed from an order of the United States District Court for the Southern District of Florida, Gonzalez, J., which denied his petition for a writ of habeas corpus. The Court of Appeals held that: (1) petitioner failed to establish that his counsel's decision to make a plea of mercy, in lieu of presenting any mitigating evidence, was not one of strategy taken after he reasonably investigated other plausible options or that counsel's decision, if tactical, was patently unreasonable; furthermore, other actions for which petitioner faulted his counsel did not amount to ineffectiveness, and (2) death penalty was not grossly disproportionate and excessive in felony-murder case in which it was established

that defendant personally killed victim, savagely beating him to death during course of a robbery.

Affirmed.

1. **Criminal Law** ⇐641.13(1)
Habeas Corpus ⇐25.1(6)

Even if in retrospect trial counsel's strategy appears to have been wrong, counsel's decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it and burden of proof to establish ineffectiveness and prejudice is on habeas petitioner.

2. **Criminal Law** ⇐641.13(6)

Petitioner failed to establish that his counsel's decision to make a plea of mercy, in lieu of presenting any mitigating evidence in murder trial, was not one of strategy taken after he reasonably investigated other plausible options or that counsel's decision, if tactical, was patently unreasonable; furthermore, other actions for which petitioner faulted his counsel did not amount to ineffectiveness.

3. **Criminal Law** ⇐641.13(1)

Effective counsel does not mean errorless counsel.

4. **Criminal Law** ⇐1206(2)
Homicide ⇐354

Death penalty was not grossly disproportionate and excessive in felony murder case in which it was established that defendant personally killed victim, savagely beating him to death during course of a robbery. West's F.S.A. § 782.04(1)(a).

5. **Criminal Law** ⇐1144.15

Jury is presumed to follow jury instructions.

6. **Criminal Law** ⇐1144.15

In murder trial, jury was presumed to have followed instruction that it could consider only the aggravating circumstances listed in the statute during penalty phase of trial.

7. **Homicide** ⇐354

In felony-murder case governed by Florida law, trial court did not err in finding that the murder was especially heinous, atrocious, or cruel.

8. **Criminal Law** ⇐1144.17

In felony-murder trial governed by Florida law, it would be assumed that trial judge followed his own jury instructions and considered only statutory aggravating circumstances in sentencing defendant to death.

9. **Habeas Corpus** ⇐85.5(1)

Petitioner failed to show that jury in his murder trial perceived that it could not consider nonstatutory mitigating factors.

10. **Habeas Corpus** ⇐85.5(1)

Petitioner, who had no specific evidence that Florida Supreme Court relied on nonrecord information in affirming his conviction for first-degree murder and death sentence, was not entitled to habeas relief based on his claim that Florida Supreme Court received nonrecord information in connection with review of his case.

11. **Habeas Corpus** ⇐85.5(15)

Petitioner, who failed to proffer any evidence that death sentence in his case was product of intentional discrimination, was not entitled to habeas relief on basis of his claim that death penalty in Florida was imposed disproportionately in cases involving a white victim and in cases tried in certain county.

12. **Constitutional Law** ⇐270(3)

Disparate impact in sentencing alone is insufficient to establish a violation of Fourteenth Amendment; there must be a showing of an intent to discriminate and only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice. U.S.C.A. Const.Amend. 14.

Craig S. Barnard, Chief Asst. Public Defender, Jerry L. Schwartz, Tatjana Ostapoff, Asst. Public Defenders, West Palm Beach, Fla., for petitioner.

Robert L. Bogen, Sharon Lee Stedman, Asst. Attys. Gen., West Palm Beach, Fla., for respondent.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and CLARK, Circuit Judges, and GIBSON *, Senior Circuit Judge.

PER CURIAM:

Convicted of first degree murder and sentenced to death, James Adams appeals the denial of his petition for a writ of habeas corpus. All of Adams' arguments on appeal concern the imposition of the death penalty. We affirm essentially on the basis of the district court's extensive opinion. We briefly review the case and address Adams' contentions *seriatim* as presented to us.

In the course of a robbery at the victim's home, Adams beat Edgar Brown senseless with a firepoker. Brown died the following day. A Florida jury found Adams guilty of murder and recommended the death penalty, which the trial judge imposed. The Florida Supreme Court affirmed the conviction and sentence. *Adams v. State*, 341 So.2d 765 (Fla.1976). The United States Supreme Court denied certiorari. *Adams v. Florida*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). The Florida Supreme Court later denied an application for relief based on the trial court's alleged reliance on confidential and erroneous information during the penalty phase of the trial, *Adams v. State*, 355 So.2d 1208 (Fla.1978), and the United States Supreme Court again denied certiorari. *Adams v. Florida*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). When the Florida state courts denied any collateral relief, *Adams v. State*, 380 So.2d 423 (Fla.1980), Adams filed his petition for habeas corpus relief in federal district court. The district court denied the writ in an unpublished opinion, but granted a certificate of probable cause and a stay of judgment pending appeal.

Ineffective Assistance of Counsel

Adams argues his counsel was ineffective during the penalty phase of the trial because he failed to present any mitigating evidence. Counsel's closing argument consisted exclusively of a plea for mercy.

[1] The crucial question is whether counsel's decision to make a plea for mercy, in lieu of presenting any mitigating evidence, was one of strategy taken after he reasonably investigated other plausible options. In *Washington v. Strickland*, 693 F.2d 1243, 1253–54 (5th Cir. Unit B 1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 75 L.Ed.2d — (1983), we observed that a strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective if counsel first adequately investigated the rejected alternatives. *Cf. Westbrook v. Zant*, 704 F.2d 1487, 1500 (11th Cir.1983) (strategic decisions generally do not render counsel ineffective). Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it. *Washington v. Strickland*, 693 F.2d at 1254; *see also Ford v. Strickland*, 696 F.2d 804, 820 (11th Cir.1983) (en banc); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir.1981), *cert. denied*, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982); *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir.1981). The burden of proof to establish ineffectiveness and prejudice is on the petitioner. *Washington v. Strickland*, 693 F.2d at 1258, 1262; *Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir.1982).

[2] Adams has failed to establish that the decision to ask the jury for mercy reflected less than reasoned professional judgment. Adams did not call trial counsel to testify at the state hearing and gave no indication to the district court as to how trial counsel would testify at any district court hearing. Support counsel did testify before the state court that the trial file revealed no specific investigation into cer-

* Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

tain matters, such as Adams' work record, church activity and lack of education, but acknowledged that the file showed counsel had interviewed Adams' wife, neighbors and former employers. Notes in the file indicated the wife knew Adams' background completely. In short, there is no basis in this record for finding that counsel did not sufficiently investigate Adams' background.

Assuming counsel's decision to forego presenting evidence of Adams' background was one of tactics, it does not appear to have been patently unreasonable. As the district court noted, counsel may have feared that if he presented evidence about defendant's background, the state could have refuted it by calling attention to damaging evidence in the record. For example, if counsel had offered evidence of Adams' family life, the state could have emphasized that Adams was separated from his wife at the time of the murder because of his relationship with a sixteen-year old girl. Similarly, if counsel had presented evidence of Adams' religious devotion, the state could have noted that he spent the Sunday before the Monday murder gambling. Counsel could have reasonably decided that raising Adams' background might do more harm than good, and that the best strategy was to ask for mercy. *See Stanley v. Zant*, 697 F.2d 955, 965 (11th Cir.1983).

[3] The other actions for which Adams faults his counsel do not amount to ineffectiveness. Adams argues his attorney should have objected first when, during the penalty phase, the state brought out that the victim of a prior rape committed by Adams was white, and second when, during argument thereafter, the state's attorney mentioned that the murder victim was a prominent, long-time local resident and Adams was from Tennessee. Defense counsel probably should have objected on both occasions. Effective counsel, however, does not mean errorless counsel. *Adams v. Balkcom*, 688 F.2d at 738; *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir.1982); *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir.1982), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. June 15, 1982) (No. 81-2240). In any event, Adams has not shown the failure to object worked to his "actual and substantial disadvantage." *Washington v. Strickland*, 693 F.2d at 1242. Put another way, it does not appear that objections by counsel would have worked to Adams' advantage in any material way.

Adams complains about the failure to "clarify" his criminal record which had been brought out at trial. Adams contends that when he testified at trial on cross that he had five or more previous convictions, he was mistaken. According to Adams, counsel should not only have realized this mistake, but also should have discovered the allegedly questionable constitutionality of three convictions. By calling attention to Adams' prior record, however, counsel might have hurt his client. The record does not establish the number of prior convictions, but there is no doubt that Adams had at least three previous convictions, including one for rape. Adams failed to establish prejudice. The government raised only the rape conviction during the sentencing proceeding, the judge properly instructed the jury to consider only statutory aggravating circumstances, and the trial court found numerous statutory aggravating circumstances to warrant the death sentence.

Imposition of the Death Penalty for Felony Murder

[4] As the murder occurred during the course of a robbery, Adams was indicted for and convicted of felony murder. Florida law classifies as first degree murder, punishable by death, a homicide committed without premeditation during the commission of certain felonies, including robbery. Fla.Stat.Ann. § 782.04(1)(a). Relying principally on *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Adams argues the death sentence in this case is disproportionate and excessive because it is based on felony murder without a specific finding of intent to kill.

Although *Enmund* did hold that the death sentence could not be imposed where no intent is shown and the killing occurs during the perpetration of a felony, that case is readily distinguishable. Defendant Earl Enmund in that case was waiting in the getaway car during a planned robbery when one or both of his two co-felons shot and killed two victims who resisted the robbery. The Supreme Court held the death penalty disproportionate to Enmund's culpability, reasoning that he personally "did not kill or attempt to kill" or have "any intention of participating in or facilitating a murder." — U.S. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. Here Adams personally killed his victim, savagely beating him to death. Adams acted alone. He is fully culpable for the murder. Under these circumstances, the death penalty is not "grossly disproportionate and excessive." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2865, 53 L.Ed.2d 982 (1977) (plurality opinion).

Adams also argues that Florida has impermissibly made the death penalty the "automatically preferred sentence" in any felony murder case because one of the statutory aggravating factors is the murder taking place during the course of a felony. The short answer is that the United States Supreme Court has upheld the Florida death penalty statute, including necessarily the use of this statutory aggravating factor. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Florida does not mandate the death penalty in all felony murder cases. The defendant is not precluded under Florida law from presenting any mitigating factors. *See id.* at 250 n. 8, 96 S.Ct. 1 at 2965 n. 8; *Ford v. Strickland*, 696 F.2d at 812.

Aggravating Circumstances Considered by Judge and Jury

[5, 6] Adams argues the aggravating circumstances considered by the trial judge and jury failed to channel their sentencing discretion as required by cases such as *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). With respect to the jury's consideration, Adams contends the prosecutor's closing remarks, in which he referred to the prominence and local roots of the victim, introduced for jury consideration nonstatutory aggravating circumstances. The judge properly instructed the jury, however, that it could consider only the aggravating circumstances listed in the statute. A jury is presumed to follow jury instructions. *See Grizzell v. Wainwright*, 692 F.2d 722, 726-27 (11th Cir.1982), *cert. denied*, — U.S. ——, 103 S.Ct. 2129, 75 L.Ed.2d — (1983).

[7] In regard to the judge's consideration of aggravating circumstances, Adams faults the judge for finding the murder "especially heinous, atrocious, or cruel." In upholding the trial judge's finding, however, the Florida Supreme Court properly noted that Adams had killed his victim "by beating him past the point of submission and until his body was grossly mangled." *Adams v. State*, 341 So.2d at 769. Although Adams argues there are Florida cases with similar facts which were not held to be "especially heinous, atrocious, or cruel," it is not the role of the federal courts to make a case-by-case comparison of the facts in a given case with other decisions of the state supreme court. *Ford v. Strickland*, 696 F.2d at 819; *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05, *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[8] Finally, Adams contends the judge's written findings reveal he considered a nonstatutory aggravating circumstance, the defendant's prior criminal record. Although it may be unclear from his findings whether the judge considered Adams' record as an aggravating circumstance or only to the extent those convictions negated the statutory mitigating circumstance of insignificant prior criminal history, it is reasonable to assume that the trial judge followed his own jury instructions and considered only statutory aggravating circumstances.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

On direct appeal, the Florida Supreme Court upheld the death sentence even

though it determined the evidence did not support two of the six aggravating circumstances found by the trial judge. *Adams v. State*, 341 So.2d at 769. The six aggravating circumstances relied upon by the trial judge were (1) the commission of the homicide by a person under sentence of imprisonment, Fla.Stat.Ann. § 921.141(5)(a); (2) the commission of the homicide by an individual previously convicted of a felony involving the use or threat of violence to a person, *id.* § 921.141(5)(b); (3) the commission of the homicide during the course of a robbery, *id.* § 921.141(5)(d); (4) the commission of the homicide to avoid arrest, *id.* § 921.141(5)(e); (5) the commission of the homicide for pecuniary gain, *id.* § 921.141(5)(f); and (6) the especially heinous, atrocious, or cruel nature of the homicide, *id.* § 921.141(5)(h). The Florida Supreme Court struck circumstances (4) and (5) as unsupported by the evidence.

Adams argues a death sentence cannot be constitutional when some, but not all, of the aggravating circumstances are struck, even though there are no mitigating circumstances. This argument is foreclosed by *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc), in which we denied constitutional relief where the Florida Supreme Court had struck three out of eight aggravating circumstances. The Florida court noted here that there were no statutory mitigating circumstances and that Adams had argued only one nonstatutory mitigating factor, his status as a human being. *Adams v. State*, 341 So.2d at 769.

Because of the United States Supreme Court's consideration of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1981), *cert. granted*, —— U.S. ——, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982), however, we will withhold the mandate until that case is decided.

Restriction on Consideration and Presentation of Mitigating Factors

[9] Adams alleges that, in an unrecorded conference held in chambers prior to the sentencing stage of trial, the trial judge expressly precluded him from presenting to the jury nonstatutory mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982). At the state court hearing on the motion to vacate, support counsel testified that he recalled the judge making a statement to this effect in this case, but he was not sure about the recollection because he had been involved in a number of death cases. Although he stated lead counsel had verified the recollection in a recent conversation, lead counsel did not testify at the hearing. The state court held this evidence insufficient and denied relief. The Florida Supreme Court affirmed, reasoning:

> Finally, we reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel of an unrecorded conversation with the trial judge, particularly when there was no proffer of specific nonstatutory mitigating circumstances at the original trial. We note that assistant defense counsel initially was not even certain that the conversation took place during this appellant's trial.

Adams v. State, 380 So.2d at 424. The state court's factual determination that the evidence did not support the claim is entitled to a presumption of correctness. 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 545–46, 101 S.Ct. 764, 768–769, 66 L.Ed.2d 722 (1981) (applying presumption of correctness to findings made by a state appellate court). This factual determination is permitted by the record. The trial judge did not expressly instruct the jury not to consider nonstatutory mitigating circumstances, and he permitted defense counsel to argue that Adams' life should be spared because he is a human being, a nonstatutory factor.

Adams argues, however, that the jury instruction implied nonstatutory mitigating factors could not be considered. Adams did not object to the instruction as required by Fla.R.Crim.P. 3.390(d).

In a case involving a virtually identical jury instruction, *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), we held that under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the

procedural default precluded review because the petitioner had not established prejudice. He had failed to show that the jury perceived it could not consider nonstatutory mitigating factors. 696 F.2d at 812–13. *Ford* disposes of Adams' argument.

The Brown Issue: Nonrecord Material Before the Florida Supreme Court

[10] Adams was one of the 123 Florida death row inmates who unsuccessfully sought relief in state court based on the Florida Supreme Court's receipt of nonrecord information in connection with the review of death cases. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

His argument in the federal court is foreclosed by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). Adams has no specific evidence that the Florida Supreme Court relied on nonrecord information in his case.

Arbitrary and Capricious Imposition of the Death Penalty on the Basis of Race and Geography

[11] Finally, Adams argues that the death penalty in Florida is imposed disproportionately in cases involving a white victim and in cases tried in St. Lucie County. In a motion before a state court for expert assistance in post-conviction proceedings, Adams cited statistics which arguably tended to support his claim. The statistics indicated, for example, that from 1973–1977 St. Lucie County accounted for 1.6% of the homicides statewide, but 3.2% of the death sentences, and that during this four-year period the death penalty was imposed in St. Lucie County in 17% of the cases involving white victims and none of the cases involving black victims, even though there were more than twice as many cases involving white victims. The state court denied Adams relief without affording him expert assistance.

[12] We need not decide whether the statistics provided by Adams suggest a disparate impact based on race and geography in the imposition of the death penalty in Florida. *See generally Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv.L.Rev. 456 (1981). Disparate impact alone is insufficient to establish a violation of the fourteenth amendment. There must be a showing of an intent to discriminate. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–65, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 239, 242, 96 S.Ct. 2040, 2047, 2049, 48 L.Ed.2d 597 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582, 614–15 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1978). Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice. *See Smith v. Balkcom*, 671 F.2d 858, 859 (5th Cir. Unit B), *cert. denied*, — U.S. —, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). That is not the case here. There were only four death sentences imposed in St. Lucie County during the four-year period, so the variance in the percentage of such sentences in cases involving white and black victims is not all that revealing. *See Adams v. State*, 380 So.2d at 425; *see also Spinkellink v. Wainwright*, 578 F.2d at 612 & n. 37, 615 (citing evidence suggesting nondiscriminatory reasons for the higher death penalty rate in Florida cases involving white victims).

Adams has not proffered any evidence that the death sentence in his case is the product of intentional discrimination. The Florida statute is unquestionably neutral on its face as to race and geography. *See Spinkellink v. Wainwright*, 578 F.2d at 614. In *Spinkellink*, we rejected a similar claim of racial inequity by a Florida death row inmate who proffered statistical evidence of a disparate impact but no convincing evidence of intentional discrimination. The Court stated:

> Mere conclusory allegations, as the petition makes here, such as that the death penalty is being "administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black per-

sons" . . . would not warrant an evidentiary hearing.

Id. at 614 n. 40; *see also Smith v. Balkcom*, 671 F.2d at 860. Because Adams was not entitled to a hearing, he was not entitled to appointed experts to assist him at a hearing.

Conclusion

We have carefully reviewed all of the arguments on appeal and all of the points ruled on by the district court. The district court's denial of the writ of habeas corpus is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5595

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

SEP 12 1983

Spencer D. Mercer
Clerk

JAMES ADAMS,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the

Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 18, 11 Cir., 198_3_ ____F.2d____).

(September 12, 1983)

Before RONEY and CLARK, Circuit Judges, and GIBSON*, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney

United States Circuit Judge

*Hon. Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

REHG-6
(Rev. 6/82)

CHAPTER 921

SENTENCE

PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8661(265); s. 110, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 45450.

Supreme Court of Florida.

Dec. 16, 1976.

Rehearing Denied Feb. 14, 1977.

Defendant was convicted in the Circuit Court, St. Lucie County, Wallace Sample, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that liability for second-degree felony-murder occurs only when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it; that the trial court did not err because its instructions on second-degree murder did not track the statute; and that, under the circumstances, the sentence of death was appropriate.

Affirmed.

Boyd, J., dissented and filed an opinion.

Hatchett, J., dissented.

1. Homicide ⇐18(1)

Under felony-murder rule, state of mind is immaterial and even accidental killing during felony is murder; malice aforethought is supplied by felony, and in this manner rule is regarded as constructive malice device. West's F.S.A. §§ 782.04, 782.04(1), (1)(a), (3).

2. Homicide ⇐18(1)

Language in second-degree felony-murder provision, "except as provided in subsection (1)," which refers to first-degree felony-murder provision, limits liability for second-degree felony-murder to occurrences when individual perpetrates underlying felony as accessory before fact but does not personally engage in it. West's F.S.A. § 782.04(1, 3).

3. Homicide ⇐18(1)

Under 1972 felony-murder statute, individual who personally kills another during perpetration or attempt to perpetrate one of enumerated felonies is guilty of first-degree murder, and in such circumstances statutory scheme does not allow for conviction of second-degree murder. West's F.S.A. § 782.04(1, 3).

4. Homicide ⇐30(1)

Liability for first-degree felony murder extends to all of perpetrator's cofelons who are personally present since, as perpetrators of underlying felony, they are principals in homicide; felony-murder rule and law of principals combines to make felon generally responsible for lethal acts of his cofelon. West's F.S.A. § 782.04.

5. **Homicide** ⇨289

Trial court, in homicide prosecution, did not err in instructing that felony-murder statute permitted liability for second-degree murder only when homicide was "not done in the perpetration of" the enumerated felonies since only if felon is accessory before fact and not personally present does liability attach under second-degree felony-murder provision; in future court approved appropriate standard jury instruction should be used rather than instruction found not erroneous in present case. West's F.S.A. § 782.04(1, 3).

6. **Homicide** ⇨354

Death penalty was appropriate punishment for defendant convicted of first-degree felony-murder where facts found by trial judge supported following aggravating circumstances: defendant committed murder while an escapee from Tennessee state prison, where he had been convicted of rape and sentenced to 99 years' imprisonment; defendant had previously been convicted of felony involving use or threat of force; defendant committed murder during course of robbery; murder was especially heinous, atrocious, and cruel; and none of statutory mitigating circumstances were shown to exist.

Richard L. Jorandby, Public Defender, Kenneth J. Scherer, Chief Asst. Public Defender, and Lois J. Frankel and Craig S. Barnard, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and George R. Georgieff, Asst. Attys. Gen., for appellee.

PER CURIAM.

This cause is before us on direct appeal from a first degree murder conviction and sentence of death imposed by the trial judge. The jury recommended the death sentence. We have jurisdiction.[1]

On November 12, 1973, at approximately 10:30 a. m., the victim Edgar Brown was brutally beaten with a fire poker during the course of a robbery in his home. Brown was found shortly thereafter, fatally injured and incoherent. He died the next day.

Appellant James Adams was convicted for the murder of Edgar Brown. The evidence reflects that a witness saw Adams and Brown driving in their respective cars toward Brown's home within a few minutes of each other just before the probable time of the crime. Other witnesses located appellant's automobile at the victim's home and driving away from it, with Adams at the wheel, immediately before the wounded Brown was found. Later that day Adams left his car, a brown Rambler, with Sammy Knight, to be painted a light green. When appellant was arrested, he possessed certain money stained with blood of a type matching that of the victim, but not of himself. The denominations of the currency corresponded to the denominations Brown was known to have carried before the attack on his person. A search of Adams' car trunk upon his arrest produced jewelry taken from Brown's home and clothing stained with blood of the victim's type.

At trial Adams denied his presence at Brown's house. Adams' testimony notwithstanding, the jury found him guilty of murder in the first degree and recommended the death penalty. The trial court found that the aggravating circumstances far outweighed any mitigating ones, and on March 15, 1974, sentenced James Adams to death for the killing of Edgar Brown during the perpetration of a robbery.

The principal issue for determination concerns the trial court's instruction on second degree murder. At the conference on instructions, it was noted that the definitions of murder had been revised by the 1972 Legislature. The murder provisions read as follows:

"782.04 *Murder.*—

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of

1. Art. V, § 3(b)(1), Fla.Const.

the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

"(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

"(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

"(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084."

Specific instructions were not discussed at the conference. In actually charging the jury on second degree murder, the court used language contained in proposed instructions drafted by the Standard Jury Instructions Committee to comply with the new death penalty statute. These instructions had not been submitted to or approved by this Court. The instruction on second degree murder given by the trial judge was as follows:

> "Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual, *and not done in the perpetration* of or in an attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb." (Emphasis added)

After retiring to deliberate, the jury requested re-instruction on the degrees of murder. At this point, both the state and appellant moved that the instructions on second degree murder be modified to "more accurately track the statute." The court denied the motions and re-read to the jury all of the original instructions.

Appellant contends that this instruction constitutes prejudicial error, asserting that the wording of the instructions on second and third degree murder bound the jury to a verdict of murder in the first degree if the jury found that Brown was killed as a part of a robbery. This limitation of the jury's options is not error. On the contrary, that result is the very goal of the first degree felony murder provision specified in Section 782.04(1)(a), Florida Statutes (1973).

[1] In its most basic form, the historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is imma-

terial.[2] Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony,[3] and in this manner the rule is regarded as a constructive malice device.[4]

Florida has always had some form of the felony murder rule.[5] In 1892, Florida's felony murder rule was first enacted similar to its present form.[6] First degree murder was defined to comprise not only killings done by premeditated design, but also those "committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, or burglary."[7] No significant change was made in the felony murder provision until the 1972 revision.

A homicide during one of the enumerated felonies under the 1972 revision is deemed first degree murder only when it is committed by,

> " . . . a person engaged in the perpetration of, or in the attempt to perpetrate . . . "

the felony. The second degree murder provision has been modified to include a felony murder provision. It includes the unlawful killing of a person,

> " . . . when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1). . . . "

In *State v. Dixon*, 283 So.2d 1 (Fla.1973), this Court noted the difference between first degree and second degree felony murder:

> "The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. . . ."

Id. at 11.

[2] We pointed out in *Dixon*, *supra*, that liability for second degree felony murder occurs when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it. This limited scope of the second degree felony murder provision is dictated by the provision, "except as provided in subsection (1)," which refers to Section 782.04(1), Florida Statutes (1975).[8]

[3, 4] We hold that under the 1972 homicide statute an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. In such circumstances, the statutory scheme does not allow for a conviction of second degree murder. Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-fel-

2. Model Penal Code, § 201.2, Comments at 39 (Tent.Draft No. 9, 1959).

3. *See, e. g., Sloan v. State*, 70 Fla. 163, 69 So. 871 (1915).

4. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U.Pa.L.R. 49, 59 (1956).

5. See Fla.Laws 1822, § 1 at 53, § 24 at 145; Fla.Laws 1824, § 11 at 208; Fla.Laws 1832, Ch. 55, § 1 at 63; and Fla.Laws 1868, Ch. 1637, Subch. 3, § 1, 2 at 63.

6. Fla.Laws 1892, Ch. 2377, 94 at 773-76.

7. Fla.Laws 1892, Ch. 2380 at 774.

8. Subsequent revision of second degree felony murder provision suggests also that perpetrator of a felony would be liable for second degree murder if during the felony there occurred a killing not committed by the felon or one of his co-felons. Thus if in resisting a felony the victim kills an innocent bystander, the felon would be susceptible to a charge of second degree murder. See Section 782.04(3), Florida Statutes (1975).

on.[9] Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.

[5] We conclude therefore that although the trial judge's instructions on second degree murder did not track the statute, under the facts of this case it did not misstate the law. If the jury believed that James Adams fatally beat Edgar Brown in the course of robbing him, Section 782.04, Florida Statutes (1973), required it to return a verdict of murder in the first degree. We find no error in the charge. Subsequent to the trial in the instant case, this Court approved an appropriate standard jury instruction under the present statute[10] and it should be the instruction used rather than the instruction found not erroneous in this cause.

Our final responsibility is to consider the appropriateness of the death sentence in order to determine independently whether the death penalty is warranted. *State v. Dixon, supra.*

[6] The facts found by the trial judge support the following aggravating circumstances: (1) Adams committed the murder while under a sentence of imprisonment, specifically while an escapee from the State of Tennessee, where he had been convicted of rape and sentenced to ninety-nine years imprisonment. (2) Adams was previously convicted of a felony involving the use or threat of force to a victim. (3) Adams committed the murder during the course of a robbery. (4) The murder was especially heinous, atrocious, and cruel, the record reflecting that he murdered his victim by beating him past the point of submission and until his body was grossly mangled. None of the statutory mitigating circumstances were shown to exist. The sole mitigating factor offered at trial was that the appellant is a human being.

We hold the sentence of death is appropriate, and affirm.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and ROBERTS (Retired), JJ., concur.

BOYD, J., dissents with an opinion.

HATCHETT, J., dissents.

BOYD, Justice, dissenting.

In my opinion, the majority's attempt to distinguish first and second degree felony murder does not work for the simple reason that the distinction is not present in the statute itself. The statute provides that when death results in connection with a robbery a verdict of second degree murder may be returned. Murder "... committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree."

The trial court specifically instructed the jury that it could not find the defendant guilty of second degree murder if it found the crime to have been committed in the perpetration of a robbery. The instruction effectively foreclosed the jury's right to find the defendant guilty of second degree murder, although it is well recognized that juries may find persons guilty of lesser included offenses in Florida under *Brown v. State*, 206 So.2d 377 (Fla.1968), and its progeny up to the recent case of *State v. Terry*, 336 So.2d 65 (Fla.1976). Furthermore, the jury was prohibited from giving a "jury pardon," a concept often recognized by this Court, e. g., *Barley v. State*, 224 So.2d 296 (Fla.1969).

In my opinion, the charge to the jury was fundamentally erroneous. No person

9. *See Pope v. State*, 84 Fla. 428, 94 So. 865 (1922). *See generally*, Note, *A Survey of Felony Murder*, 28 *Temple L.Q.* 453 (1955).

10. For jury instructions on murder appropriate under the current statute, *see Florida Standard Jury Instructions in Criminal Cases*, Homicide (2d ed. 1975).

should be executed based upon a record containing obvious reversible error, and it would certainly be improper to classify this error as harmless.

It is significant that five of the twelve jurors voted to recommend life imprisonment instead of death upon finding appellant guilty of first degree murder. Although convinced the murder occurred in the course of a robbery, they might have held out for a conviction of second degree murder had the opportunity to do so not been foreclosed by the trial court's charge.

The gory and cruel nature of the crime should not justify what I conceive to be fundamental error. Human life is too precious to be extinguished by the State without a legally proper trial.

I would reverse the judgment of the trial court and order a new trial.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 45430.

Supreme Court of Florida.

March 2, 1978.

Rehearing Denied April 7, 1978.

Following his conviction before the Circuit Court, St. Lucie County, Wallace Sample, J., defendant filed application for relief from imposition of death sentence. The

Supreme Court held that where imposition of death sentence was based in part on defendant's own testimony at sentencing hearing that he had five prior convictions, and trial court stated that it did not base its decision on any information which was not known to defendant or his counsel of record, defendant's application for relief from imposition of death sentence would be denied.

Order accordingly.

Hatchett, J., dissented.

Criminal Law ⇐1208(1)

Where imposition of death sentence was based in part on defendant's own testimony at sentencing hearing that he had five prior convictions, and trial court stated that it did not base its decision on any information which was not known to defendant or his counsel of record, defendant's application for relief from imposition of death sentence would be denied.

Richard L. Jorandby, Public Defender, Kenneth J. Scherer, Chief Asst. Public Defender, and Lois J. Frankel and Craig S. Barnard, Asst. Public Defenders, West Palm Beach, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and George R. Georgieff, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Subsequent to the decision of the Supreme Court of the United States, in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court entered its order on May 6, 1977, establishing a procedure whereby the trial judge who imposed the death sentence was directed to file a response stating whether he imposed the sentence on the basis of consideration of any information not known to appellant. This order also provided that any application for relief pursuant to the United States Supreme Court's ruling in *Gardner v. Florida*, *supra*, should be filed with this Court within thirty (30) days after the trial judge had filed his response pursuant to this Court's directive.

On May 12, 1977, the trial court filed its response stating that in imposing the death sentence it "did not have any information whatsoever, either as listed herein or otherwise . . . which [the court] used as a basis for consideration in imposing the death sentence which was not known to the appellant and/or his counsel of record."

In his application for relief, appellant argues that he has had no opportunity to deny or explain certain factual findings relied on by the trial judge in his sentencing order. The order, which set forth specific findings of fact on which the death sentence was imposed, states in part:

> By his own admission the defendant was *previously convicted of crimes on at least five occasions* and the further undisputed evidence shows the defendant has a record involving crimes of violence.
>
> [Emphasis supplied.]

Appellant contends that he has not been convicted on five previous occasions and that the evidence before the trial court did not show that he had been convicted of prior crimes involving violence but that he had only one previous conviction for rape in Tennessee in 1962.

The admission of five previous crimes to which the trial court referred in its sentencing order was appellant's response during cross-examination. In response to the state attorney's question regarding how many times he had been convicted of a crime, appellant stated: "Maybe five or more, I don't know, something like that." (R. 926).

The Court finds this application for relief pursuant to *Gardner v. Florida* to be without merit. Appellant complains of nothing more than the use by the trial court of his testimony given at trial in sentencing the appellant. Appellant had ample opportunity to explain or refute his own testimony at trial.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD, ENGLAND and KARL, JJ., concur.

HATCHETT, J., dissents.

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 58576.

Supreme Court of Florida.

Feb. 8, 1980

The Circuit Court, St. Lucie County, C. Pfeiffer Trowbridge, J., denied motion for postconviction relief, and movant appealed. The Supreme Court held that: (1) asserted issues concerning prejudicial argument and testimony could have been raised in prior direct appeal and, hence, could not support a collateral attack, and (2) fact that there were four death sentences imposed during four-year period in St. Lucie County, together with conclusions drawn therefrom, did not constitute a sufficient preliminary factual basis to establish that death penalty was imposed in arbitrary, capricious and irrational manner.

Affirmed.

1. Criminal Law ⇐99(3)

Since asserted issues concerning prejudicial argument by prosecutor and inflammatory testimony by the state could have been raised in prior appeal from conviction, such matters would not support a subsequent collateral attack by way of petition for postconviction relief. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

2. Criminal Law ⇐99(17)

Postconviction claim that sentencing process was required to be voided because of tainted recollection of assistant defense counsel of an unrecorded conversation with the trial judge was rejected, particularly where there was no proffer of specific nonstatutory mitigating circumstances at original capital punishment trial. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

3. Criminal Law ⇐641.13(7)

Defendant was not denied effective assistance of counsel at sentencing phase on ground that counsel failed to properly investigate prior conviction and failed to present testimony concerning family life and church involvement where record contained testimony of defendant's wife, girl friend and defendant himself during guilt and innocence phase which could have been used to seriously impeach any such contentions concerning defendant's character. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐1208(1)

Fact that there were four death sentences imposed during four-year period in St. Lucie County, together with conclusions drawn therefrom, did not constitute a suffi-

cient preliminary factual basis to establish that death penalty was imposed in an arbitrary, capricious, and irrational manner. U.S.C.A.Const. Amend. 14.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a denial of James Adams' motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The appellant seeks a stay of execution pending a review of that proceeding by this Court.

This Court has afforded the appellant an opportunity to fully present the issues to this Court, including oral argument. For the reasons expressed, we affirm the trial court's denial of relief and deny the stay of execution.

This Court initially affirmed the appellant's conviction and sentence of death in *Adams v. State*, 341 So.2d 765 (Fla.1976), *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). Subsequent to this affirmance, this Court issued a *Gardner* order to the trial court, requiring the disclosure of any information used by the trial judge in sentencing which was not disclosed to appellant during the sentencing phase. The trial judge responded that no undisclosed information had been utilized in the sentencing. Appellant then petitioned for review in this Court, stating that the judge had relied upon erroneous information in sentencing, most particularly the statement by appellant himself that he had been convicted of crimes on five prior occasions. Appellant alleged that even though there had been no disclosure violation, the trial judge's reliance upon the inaccurate information violated due process standards as stated in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and thus entitled appellant to a new sentencing hearing. This application for relief was denied. *Adams v. State*, 355 So.2d 1205 (Fla.1978), *cert. denied*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

In the instant petition, appellant first contends that (a) there was inflammatory testimony presented by the state, and argument propounded by the prosecutor, which were prejudicial, (b) the sentencing judge relied upon the fact that the appellant had been convicted five times, and (c) the sentencing judge in an unrecorded conversation prohibited nonstatutory mitigating circumstances from being presented to the jury. We find these contentions to be without merit.

[1] The asserted issues concerning prejudicial argument and testimony could have been raised in the first appeal to this Court, and these matters thus will not support a collateral attack. *Spenkelink v. State*, 350 So.2d 85 (Fla.1977), *cert. denied*, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977); *Sullivan v. State*, 372 So.2d 938 (Fla.1979). The issue concerning the reliance by the trial judge upon the five previous convictions testified to by the appellant was disposed of in *Adams v. State*, 355 So.2d 1205 (Fla.1978), *cert. denied*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978).

[2] Finally, we reject the claim that the sentencing process must be voided because of a tenuous recollection of assistant defense counsel of an unrecorded conversation with the trial judge, particularly when there was no proffer of specific nonstatutory mitigating circumstances at the original trial. We note that assistant defense counsel initially was not even certain that the conversation took place during this appellant's trial.

[3] In his second point, appellant maintains that he was denied effective assistance of counsel in the sentencing phase of his trial because his counsel failed to properly investigate his prior convictions and failed to present testimony concerning his family life and church involvement. The record contains testimony of appellant's wife, his girl friend, and the appellant himself during the guilt and innocence phase which could have been used to seriously

impeach any such contentions concerning appellant's character. The appellant testified of his playing cards and drinking for four days, including the Sunday prior to the murder. As previously stated, the appellant personally testified that he had a record of five convictions.

State and federal courts are engaged in an evolving process of determining what measure of competence shall be demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The Fifth Circuit Court of Appeals requires that counsel provide "reasonably effective assistance." *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976). The Eighth Circuit requires "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 963, 966 (8th Cir. 1976). The Third Circuit demands "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 522 F.2d 730, 736 (3rd Cir. 1975). The various theories to determine ineffective assistance of counsel are discussed extensively in Tague, The Attempt to Improve Criminal Defense Representation, 15 Am.Crim.L.Rev. 109, and in *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979). We find that by even the most demanding standard, the appellant has not demonstrated on the record made in the trial court that there was ineffective assistance of counsel.

Further, in this proceeding the appellant has offered only conclusory statements by an assistant defense counsel as other potential mitigating evidence or as evidence which would ameliorate the factors proved in aggravation. This attorney admits he was brought into the cause only as co-counsel in a support capacity and he was not even present during the entire guilt-innocence phase of the trial. Appellant has proffered no specific evidence which he claims should have been presented in mitigation. Irrespective of his lack of any specific proffer, it is our view that the mitigating and ameliorating evidence suggested in appellant's allegations would not have affected the sentence, and was, in fact, a result negated to a large extent by the appellant's own testimony during the guilt-innocence portion of the trial.

[4] In his final point, the appellant argues that he was improperly denied an opportunity for a hearing on the issue of whether the death penalty is arbitrarily and discriminatorily applied in St. Lucie County, as evidenced by the four death sentences imposed in that county during the period 1973-1977. We find the mere fact that there were four death sentences imposed during the four-year period in St. Lucie County, together with the conclusions drawn therefrom, does not constitute sufficient preliminary factual basis to establish that the death penalty was imposed in an arbitrary, capricious and irrational manner.

The order of the trial judge is affirmed, and the motion for stay of execution of sentence is denied.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JAMES ADAMS,	)	CASE NO. 80-8041-CIV-JAG
Petitioner	)	
vs	)	
LOUIE L. WAINWRIGHT, etc.,	)	O R D E R
Respondent.	)	

THIS CAUSE has come before the Court upon a Petition for Writ of Habeas Corpus. Petitioner, James Adams, was convicted of first degree murder under Fla. Stat. § 782.04 for the unlawful killing of Edgar Brown while Petitioner was engaged in or attempting to perpetrate the felony of robbery. Petitioner was sentenced to death and, after his state remedies were exhausted, the death warrant was signed on February 8, 1980. By Order of February 9, 1980, this Court stayed the Petitioner's execution pending further Order of the Court.

Petitioner raises five grounds for relief. First, Petitioner argues that the imposition of the death penalty in this case violates the eighth and fourteenth amendments because it is based on a non-deliberate killing. Relying on the plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976), and Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), Petitioner asserts that the death penalty is a grossly disproportionate and excessive punishment in a case such as his, in which there was no finding of deliberateness. Assuming arguendo that the death penalty may be constitutionally imposed only in cases involving a deliberate killing, in this case the underlying felony supplies the necessary intent element.

Petitioner was convicted of the unlawful killing of a malo human being during the perpetration of a robbery. Under Florida law this constitutes first degree murder under the felony murder rule. The felony murder rule, codified in Fla. Stat. § 782.04, defines as murder any homicide committed during the perpetration of or the attempt to commit a dangerous felony, including robbery. Although

evidence of the defendant's state of mind need not be presented to prove a case of first degree murder when the felony murder rule applies, the intent to commit the crime is presumed from the underlying felony; premeditation is deemed proven by evidence of the accused's felonious conduct. Wheeler v. State, 362 So.2d 377, 379 (Fla. 1st DCA 1978), cert. denied, 440 U.S. 924 (1979); Ables v. State, 338 So.2d 1095, 1097 (Fla. 1st DCA 1976), cert. denied, 346 So.2d 1247 (Fla. 1977). As the Supreme Court of Florida stated in the earlier proceedings of this case, the felony murder rule

> stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidential killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.

Adams v. State, 341 So.2d 765, 767-68 (Fla.) cert. denied, 434 U.S. 878 (1977) (footnotes omitted). See, e.g., Sloan v. State, 70 Fla. 163, 69 So. 871 (1915).

Accordingly, Petitioner's contention that the death penalty is being imposed as punishment for a non-deliberate killing in this case is erroneous. The deliberateness of the act is presumed from the evidence at Petitioner's trial that the beating that resulted in the victim's death occurred during the perpetration of a robbery. The felony murder rule simply obviated the necessity of proving the defendant's state of mind. The Court, therefore, rejects Petitioner's argument that the imposition of the death penalty in this case is disproportionate to the crime and excessive, in violation of the eighth and fourteenth amendments.

Petitioner next argues that his death sentence "shocks the conscience" because the procedures used were grossly unreliable and wholly arbitrary, and did not meet the safeguards required by the

eighth and fourteenth amendments. Petitioner alleges eight points of procedural error to support this argument. The Court concludes that none of the procedural errors alleged rise to constitutional significance.

Testimony was elicited from the Petitioner on cross-examination during the guilt/innocence phase of the trial, that Petitioner had five prior convictions. Petitioner argues that this testimony was in error, and that by allowing this testimony in, the jury or the judge considered a non-statutory aggravating factor and/or relied on erroneous testimony to negate a statutory mitigating factor. The Court finds that the error, if any, was harmless and was the Petitioner's fault alone.

First, there is no conclusive evidence that the Petitioner's testimony of five prior convictions was in error. In addition, the state did not rely on this testimony in the sentencing phase of the proceedings, and the trial judge gave the jury proper instructions, tracking the language of the statute; thus, it cannot be concluded that the jury or the judge improperly relied on non-statutory aggravating circumstances. Moreover, it is apparent from the record of all the proceedings that Petitioner has at least some significant prior criminal record. Therefore, the trial judge's express finding that the statutory mitigating factor of no significant criminal history had been negated, based on the Petitioner's testimony, is supported by the record and any error was harmless.

Petitioner also points to the mugshot and fingerprints that were introduced in the sentencing phase as grounds for finding procedural error because they were not linked to any of the Petitioner's prior convictions. There was no objection to this evidence being admitted at trial, and it was submitted only for identification purposes to prove that the Petitioner was the same person who had been previously convicted of rape.

Likewise, the Petitioner's arguments that the trial court made numerous errors in his findings of fact and that he should not

have immediately sentenced the defendant are without merit. There is no constitutional requirement that the trial judge expressly find that the homicide was deliberate or that he expressly state that the aggravating circumstances were found beyond a reasonable doubt. The deliberateness of the homicide is implied from the underlying felony. Further, it can be assumed from the fact that the trial judge gave the jury proper instructions that the judge knew the law. Contrary to Petitioner's contention, the trial judge's use of the underlying felony as an aggravating circumstance in his findings of fact will not result in the death penalty being imposed in all felony murder cases; rather, the Florida death penalty statute requires the weighing of all mitigating and aggravating circumstances.

Finally, there is no prohibition against the judge sentencing the defendant immediately upon receiving the jury's advisory verdict. To the contrary, a defendant has a right to speedy sentencing. Jurrego-Cesares v. United States, 496 F.2d 190, 192 (5th Cir. 1975).

There is no reliable evidence in the record to support Petitioner's argument that the trial judge limited the parties to the presentation of statutory mitigating factors only, in violation of Lockett v. Ohio, 438 U.S. 586. The judge tracked the language of the statute in charging the jury, and did not instruct the jury not to consider other non-statutory mitigating factors. In fact, Petitioner's counsel argued at the sentencing phase that the Petitioner's life should be spared because he is a human being, a factor in mitigation not listed in the statute.

Petitioner also argues that inflammatory remarks were made by the prosecutor, and that Petitioner was thereby denied the right to a fair trial. At the guilt/innocence phase of the trial, the prosecutor commented on the fact that the victim of the rape for which Petitioner was convicted of in Tennessee was a white woman and that the Petitioner was black. Only one reference was made to this fact and it was not repeated at the sentencing phase.

At the sentencing phase, the prosecutor also pointed out that the Petitioner was not from the community and that he had killed

"one of our people", thereby appealing to the juror's community bias. While the propriety of the foregoing remarks is doubtful, they alone are not of such an inflammatory nature that it can be concluded that the Petitioner was deprived of his constitutional right to a fair trial.

Petitioner's argument that he was deprived of notice of the aggravating circumstances that the state intended to rely on was rejected in Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976(1979), in which the court held that the Florida death penalty statute alone provides sufficient notice to the defendant. Id. at 609-10.

Finally, the Petitioner argues that the Supreme Court of Florida erred in upholding the death penalty after eliminating two of the aggravating circumstances that the trial judge relied upon, and complains of the Supreme Court of Florida's mechanical imposition of the death penalty in cases in which no mitigating factors are found.

In Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion), the Supreme Court recognized that a sentence could be upheld even though the reviewing court rejected one or more of the aggravating circumstances found by the trial court, provided that the balancing process again results in the same conclusion that the death penalty is appropriate. Id. at 250 n.8, 256 n.14. Furthermore, there is no evidence that the Supreme Court of Florida's review of death penalty cases is mechanical in nature. Instead, it is apparent from its opinions that the Supreme Court of Florida is well aware of its duty to balance all the aggravating and mitigating circumstances and make a case-by-case determination. See, e.g., Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Petitioner's third ground for relief is that the Florida death penalty statute is unconstitutional on its face and as applied. Petitioner argues that the death penalty is arbitrarily imposed in

Florida on the basis of race, geography, and other arbitrary factors. Petitioner also argues that he was denied equal protection and the opportunity to present these claims by the trial court's refusal to grant him the funds necessary to prove his claim of arbitrary application.

In Proffitt v. Florida, 428 U.S. 242, the Supreme Court of the United States recognized that the procedure followed in Florida in capital cases, including the guidance given to the trial judge by the death penalty statute, as well as the appellate review system, minimizes any risk that the death penalty will be imposed arbitrarily or capriciously. Id. at 253.

This argument was also raised and disposed of in Spinkellink v. Wainwright, 578 F.2d 582, 604-06. The Fifth Circuit stated in Spinkellink that if a state has a properly drawn statute, such as Florida does, which the state follows in determining which defendants receive the death penalty, then the arbitrariness and capriciousness have been conclusively removed. Id. at 605. Furthermore, as a matter of comity and federalism, the sentencing process should be reserved to the state judiciary, without the federal courts unduly interfering. Id. at 606. Thus, finding nothing in the record to support allegations of arbitrary application, and noting that the procedures followed by the state courts in this case were similar in nature, it is not within the province of this Court to review substantively the sentencing decision. See Spinkellink, 578 F.2d at 614 n.40.

The Spinkellink decision also disposes of the petitioner's argument that he was denied equal protection because the trial court would not grant him the funds necessary to prove his case of arbitrary application of the death penalty. The Fifth Circuit stated that mere conclusory allegations of arbitrary administration of the death penalty statute is not sufficient to even warrant an evidentiary hearing. The Petitioner must be able to show some specific set of facts evidencing intentional or purposeful racial discrimination against him. Id. at 614 n.40. Thus, it follows that if Petitioner

has not alleged sufficient facts to require an evidentiary hearing, the trial court did not commit error in denying him the expenses to gather and present such evidence to the court.

Petitioner further argues that death by electrocution is unconstitutional because it imposes unnecessary physical and psychological torture, that the Florida death penalty statute fails to give the jury proper guidance because it specifies no standard of proof for the overall weighing process, and that the aggravating circumstances, as applied to Petitioner and in general, are unconstitutionally vague and fail to adequately channel the sentencing decision patterns of judges and juries. These same arguments have been raised and rejected in prior decisions controlling this Court. See Spinkellink v. Wainwright, 578 F.2d 582, 616 (electrocution not unconstitutional means of execution); Proffitt v. Florida, 428 U.S. 242, 254-58 (1976) (Florida statute sufficiently clear and precise in its directions to the judge and jury with regard to the aggravating and mitigating circumstances and the weighing process).

Petitioner's fourth ground for relief is that he was denied effective assistance of counsel at the sentencing phase of the proceedings. As the Fifth Circuit has stated,

> effective counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance"... This necessarily "involves an inquiry into the actual performance of counsel in conducting the defense ... based on the totality of the circumstances and the entire record."

Beavers v. Balkcom, 636 F.2d 114, 115 (5th Cir. 1981) (citations omitted). Applying this standard, and noting the acts of trial counsel that Petitioner points to as evidence of ineffective assistance of counsel, the Court finds that only one of Petitioner's allegations merits any discussion at length, to wit, that trial counsel failed to adequately investigate or present any evidence in mitigation at

the sentencing phase.

During the sentencing phase, Petitioner's counsel indicated that he had no evidence. His closing argument consisted of the following: "I find it necessary to ask for you to consider that you save [the Petitioner's] life, in spite of all this [the evidence presented by the state] and let this man live, for no other reason than that he is a man." Trial Transcript at 1175, 1180. Petitioner argues that evidence in mitigation could and should have been presented during the sentencing phase. For example, Petitioner points to his family background in rural Tennessee, his lack of education, and his active involvement in the Baptist church.

In light of the total circumstances, the Court cannot find that the failure to present this evidence constituted a failure to provide effective assistance of counsel. Trial counsel's decision not to present this evidence may well have been based on the consideration that were this evidence presented, the state may well have presented more damaging character evidence in rebuttal. For example, had the Petitioner's wife testified to his family background, the state could have brought out evidence that the Petitioner and his wife were separated because of his relationship with a sixteen-year-old girl. Even though another attorney may have presented this evidence or may have made a different tactical decision, it cannot be concluded that Petitioner's counsel was ineffective. Williams v. Estes, 354 F.2d 698, 706 (5th Cir. 1965).

Petitioner's final grounds for relief is based on the Florida Supreme Court's receipt of ex parte information concerning Petitioner in its review of his appeal. Petitioner argues that the Supreme Court's practice of requesting and receiving this information, without notice to the Petitioner, denies him due process of law, the effective assistance of counsel, the right of confrontation, and subjects him to cruel and unusual punishment and to compulsory self-incrimination, in violation of the fourteenth amendment and its incorporated guarantees.

On September 29, 1980, Petitioner, along with one hundred twenty-one other death-sentenced appellants, filed an Application for Extraordinary Relief and Petition for Writ of Habeas Corpus in the Supreme Court of Florida based on the same grounds as stated above. The Supreme Court of Florida denied relief as to all petitioners. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for writ of certiorari was then filed in the Supreme Court of the United States. By Order of August 31, 1981, this Court stayed all proceedings in this cause pending disposition of Brown v. Wainwright in the Supreme Court of the United States. The petition for writ of certiorari was denied on November 2, 1981. Brown v. Wainwright, 50 U.S.L.W. 3369 (Nov. 2, 1981). As a result, the Court will proceed to decide this issue on the merits.

The Court notes that the issue presented here and in Brown v. Wainwright is now pending in the Eleventh Circuit Court of Appeals in the cases of Johnny Paul Witt v. Louie L. Wainwright, No. 81-5709, and Charles Kenneth Foster v. Charles G. Strickland, Jr., No. 81-5734.

Petitioner's contention is based at least in part on Gardner v. Florida, 430 U.S. 349 (1977), which prohibits the imposition of the death penalty to any extent on the basis of non-record, unchallengeable information. Id. at 362. As the Supreme Court of Florida pointed out in Brown v. Wainwright, the state Supreme Court merely reviews the death sentence; the imposition of the sentence is a function for the trial judge based on the jury's recommendation. 392 So.2d at 1332. Thus, "Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information." Id.

To the extent that the Petitioner's argument is not based on Gardner, the Court notes that neither of the Supreme Court of Florida's duties in reviewing death sentences--determining that procedural regularity has been followed with regard to the judge and jury, and ensuring proportionality among death sentences imposed within the state--involves weighing or reevaluating the evidence

used to establish aggravating or mitigating circumstances. See Brown, 392 So.2d at 1331. Moreover, the Supreme Court of Florida stated in Brown that "[f]actors or information outside the record play no part in our sentence review role." Id. at 1332.

The Supreme Court of Florida in Brown also addressed the question of whether the reading of non-record documents affected the ability of members of the court to properly perform their appellate functions. As the court stated: "Plainly it would not. Just as trial judges are aware of matters they do not consider in sentencing, ... so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks." Id. at 1331 (citation and footnote omitted).

Accordingly, this Court adopts the reasoning of the Supreme Court of Florida, and rejects the Petitioner's argument that the ex parte receipt of information by the Supreme Court of Florida entitles him to relief.

Based on the foregoing reasons, it is ORDERED AND ADJUDGED that the petition for writ of habeas corpus be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 17th day of February, 1982.

Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE